FILED
AUG 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 98-167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARIZONANS FOR OFFICIAL ENGLISH, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

BRIEF OF WASHINGTON LEGAL FOUNDATION, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, THE ALLIED EDUCATIONAL FOUNDATION, 12 MEMBERS OF CONGRESS, AND THE STATES OF NEBRASKA AND ALABAMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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25 pp

ADDITIONAL *AMICI CURIAE*

(continued from front cover)

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BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with supporters in all 50 states.[1] WLF participates in litigation and administrative proceedings affecting the broad public

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. WLF filed a brief before the Arizona Supreme Court below; before the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), which also concerned the constitutionality of Arizona's Official English amendment; and before this Court on the petition for writ of certiorari and on the merits in *Arizonans for Official English v. State of Arizona*, 117 S. Ct. 1055 (1997) (hereinafter "*Yniguez*").

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational and research institution founded in 1979 and based in Claremont, California. The Claremont Institute seeks a return of America's founding principles to their rightful preeminence in our public life. It agrees with our Founding Fathers that the citizenry's adherence to America's central principles, coupled with an enlightened public discourse, is essential to successful republican government. The Claremont Institute believes that both are threatened by the fragmentation inherent in multiculturalism and multilingualism, and that Official English provisions help preserve the language of our political and legal traditions as the common tongue of all Americans, regardless of their heritage. The Claremont Institute joined with WLF in its brief before the Arizona Supreme Court below and its brief on the merits before this Court in the *Yniguez* case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared in *amicus curiae* before this Court in a number of cases of interest to the business community. AEF joined with WLF in its brief before the Arizona Supreme Court below.

United States Representatives Charles T. Canady, Bob Barr, Douglas Bereuter, Ken Calvert, Chris Cannon, John T. Doolittle, Bob Goodlatte, Asa Hutchinson, Bob Inglis, Peter King, Matt Salmon, and Bob Stump are Members of Congress who oppose the ruling of the Arizona Supreme Court below and who believe that it should be reversed. These Members are concerned by the decision's potential implications with respect to any future legislation on "Official English" by the states and by Congress, particularly in light of its resurrection of the Ninth Circuit's *en banc* opinion in the *Yniguez* case. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.

Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

The States of Alabama and Nebraska, like the State of Arizona, have provisions in their state constitutions declaring English to be the official language of the state. Ala. Const. amend. 509 (1990); Neb. Const. art. I, § 27. The States of Alabama and Nebraska are concerned about the

implications of the decision below for the validity of their own state constitutional provisions and any legislation or regulations adopted pursuant to them. Following Amendment 509, the Alabama Department of Public Safety adopted a policy requiring that driver's license examinations be administered solely in English. That policy was recently invalidated by a federal district court in an opinion which cited the Arizona Supreme Court's decision below. *Sandoval v. Hagan*, 1998 WL 295891, at *38, 73, 76 (M.D. Ala. June 3, 1998).

Amici believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is desirable and constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case presents the Court with an important opportunity to decide an issue of great and enduring national importance: whether the government may direct its employees to perform the government's official business exclusively in the English language. This Court recognized the suitability of this issue for review when it granted certiorari in the *Yniguez* case to review the six-to-five vote of a Ninth Circuit *en banc* panel striking down the Official English provision of the Arizona state constitution. The Court was unable to reach the merits of the decision in *Yni-*

guez because of mootness issues that required it to vacate the lower federal court decisions. The Arizona Supreme Court decision below, which is based solely on federal constitutional grounds, expressly follows the vacated Ninth Circuit decision, and raises the same purported First Amendment rights of public employees essentially to commit insubordination while on the job. This Court's definitive guidance on the application of its prior decisions continues to be needed in this controversial area. Because this case does not present the same mootness and standing issues that prevented the Court from reaching the merits before, it presents a suitable case for granting review.

The constitutional issues presented in this case are important far beyond the borders of Arizona: Official English provisions have been adopted by constitutional amendment or statute in many states, and bills to enact such legislation on the federal level have been before Congress. A decision by the Court in this case will not only eliminate uncertainty as to Official English provisions, but also will provide important direction to lower courts as to a variety of legal issues involving government policy on language. The Court should again take this opportunity to address the extent to which the U.S. Constitution constrains government action to preserve English as the nation's common and official language.

ARGUMENT

I. The Issues Presented by the Petition Are Matters of Great National Importance Deserving Review by this Court.

This Court should grant a writ of certiorari and review the decision below of the Arizona Supreme Court because

the case squarely presents an issue of great national significance: may the people direct their government to conduct its official business only in the people's common language? Regardless of one's position on the merits of that question, it is an issue that has been closely scrutinized, hotly debated, and frequently raised, and one that deserves this Court's review at this time and in this case. This Court recognized the importance of the issue when it granted certiorari to review the constitutionality of the very same Arizona constitutional amendment in the *Yniguez* case.

While the Court declined to address the merits in the *Yniguez* case after finding the case moot, the issue has not gone away. Rather, now more than ever it cries out for review. Relying solely on the First and Fourteenth Amendments to the U.S. Constitution, the Arizona Supreme Court held Article XXVIII of the Arizona Constitution to be invalid. Although this Court vacated the Ninth Circuit's and district court's rulings in the *Yniguez* case, the Arizona Supreme Court expressly relied on the Ninth Circuit's opinion. Pet. App. 7a n.1. Article XXVIII was adopted by a vote of the people of Arizona in 1988, and federal constitutional principles are still being invoked to thwart that decision of Arizona voters. This Court should grant review once again to redress that wrong.

The Arizona Official English constitutional provision at issue in this case is not a unique political phenomenon, and definitive resolution of the central issues may eliminate uncertainty as to constitutional constraints and obviate further costly litigation. Several states have adopted similar constitutional provisions; many more have adopted legislation to the same effect; and Official English bills and ballot propositions have been advanced in many others. *See* Pet. 26 n.8 (collecting citations). Contrary to the misapprehen-

sion of the Arizona Supreme Court, the Arizona provision is in no sense unique. Indeed, it has been the model for subsequent constitutional and legislative enactments,[2] and its detailed provisions will provide guidance to state legislatures and Congress in the enactment of statutes and regulations implementing what the Arizona Supreme Court deemed "merely symbolic" Official English provisions. Pet. App. 28a.

In addition, Congress has considered Official English constitutional amendments on at least three occasions in recent years.[3] Indeed, Congress has held hearings on several bills that would declare English the official language of the United States and require all functions of the federal government to be performed exclusively in English in most or all circumstances.[4] Many of these legislative actions have been prompted by national and state organizations committed to affirming the role of English as the common language of the United States, including U.S.

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[2] *E.g.*, 1995 N.H. Laws 157.

[3] Bills have been introduced in Congress in 1981, 1984, and 1988 to amend to the Constitution to make English the official language of the United States. *See* The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984); S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[4] *See* Making English the Official Language of the United States: Hearing Before the Senate Governmental Affairs Comm., 104th Cong., 1st Sess. (Dec. 7, 1995); S. 356, 10th Cong., 1st Sess. (introduced Feb. 6, 1995); H.J. Res. 109, 104th Cong., 1st Sess. (introduced Sept. 29, 1995); S. 175, 104th Cong., 1st Sess. (introduced Jan. 10, 1995); H.R. 1005, 104th Cong., 1st Sess. (introduced Feb. 22, 1995); H.R. 739, 104th Cong., 1st Sess. (introduced Jan. 31, 1995); H.R. 123, 104th Cong., 1st Sess. (introduced Jan. 10, 1995).

English, English Language Advocates, and petitioner Arizonans for Official English (AOE).

Nor is the Official English issue one of fleeting political significance. The end of the Cold War has seen the reemergence of cultural and linguistic units as powerful political forces around the world. The interaction between language and government, particularly the designation of certain languages as the official language of government, has become a fundamental regime question threatening the political integrity and stability of several nations, including the former Soviet Union and Canada.[5] The ongoing struggle to preserve the Canadian federation in light of linguistic differences will continue to fuel concerns about the possibility of similar strains in American society, which in turn will drive legal efforts regarding the official status of the English language.

This case poses most directly the question whether the government may require its employees to conduct official state business in a particular language. That issue, however, is closely related to several other issues of national importance and great concern, and a ruling by the Court in this case no doubt will provide guidance in related areas. Such related issues include whether there is a right to receive government services in languages other than

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[5] *See, e.g.*, Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 Emory L.J. 223 (1992); Terrence Meyerhoff, Note and Comment, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 Am. U.J. Int'l L. & Pol'y 913 (1994); Kevin Sneesby, Comment, *National Separation: Canada in Context -- A Legal Perspective*, 53 La. L. Rev. 1357, 1358-59 (1993).

English;[6] whether private employers may require their employees to speak English during business hours;[7] whether the state may require private businesses to communicate certain messages (such as consumer product safety warnings) in languages other than English;[8] and whether linguistic skills may properly be considered in jury selection.[9] While different legal standards apply in many of these other contexts, as a practical matter there will no doubt be a substantial spillover effect from a decision by this Court in this case.

This Court's guidance on such issues is indispensable. The Arizona Supreme Court's ruling, like the Ninth Cir-

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[6] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Sandoval v. Hagan*, 1998 WL 295891 (M.D. Ala. June 3, 1998).

[7] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[8] *See Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992); *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423 (Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993); 40 C.F.R. § 156.206(e) (1993) (EPA regulation requiring Spanish-language warning statements in certain circumstances); 16 C.F.R. § 307.5 (1994) (FTC regulation requiring tobacco warnings to be in predominant language of non-English periodicals).

[9] *See Hernandez v. New York*, 500 U.S. 352 (1991); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994); *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976).

cuit's 6-5 *en banc* decision on which it relied, turns in great measure on the interpretation and application of decisions by this Court, including not only its seminal decision on language rights in *Meyer v. Nebraska*, 262 U.S. 390 (1923), but also several recent decisions bearing on the First Amendment rights of public employees. Only this Court can give definitive instruction on the meaning and import of its prior decisions.

II. The Issue Is Ready for Review by This Court.

A. The Issues Are Ripe.

This case and the issue it presents are ripe for review by this Court. Not only the Arizona Supreme Court but also the Ninth Circuit among the Courts of Appeals has rendered a decision on the Arizona Official English provision, and it would be both unnecessary and unproductive for this Court to pass on this opportunity to hear this issue in order to allow the issue to percolate among the circuits and the state courts. Moreover, the Ninth Circuit has considered English-language-only rules for public employees in other cases as well.[10] Where the issue was of such pressing concern, this Court has accepted review without requiring consideration by multiple circuits or even

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[10] *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989); *id.*, 861 F.2d 1187, 1194 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc); *Spun Steak*, 998 F.2d 1480; *id.*, 13 F.3d 296 (Reinhardt, J., dissenting from denial of rehearing en banc).

one circuit.[11] That the issues have been sufficiently raised and explored is confirmed not only by these decisions, but also by the extensive legal commentary and scholarship on Official English proposals that have been published over many years, and well as numerous analyses about related issues of language policy. *See* Brief of the Washington Legal Foundation, *et al.*, on Petition for Writ of Certiorari in *Yniguez* at 11-13 & nn.14-18, No. 95-974 (filed Jan. 22, 1996) (collecting citations).

B. This Case Is Procedurally Appropriate for Review.

This case is procedurally appropriate for review by this Court. The dispute is not fact-bound and requiring of further findings by the lower courts. The Arizona Supreme Court construed the Arizona constitutional provision on its face rather than as applied to the specific facts of respondents. This Court has a suitable opportunity to decide issues of great national importance; it should avail itself of that opportunity and grant the petition.

Moreover, this case does not present the issue of mootness that prevented the Court from reaching the merits in *Yniguez*, nor the concerns about petitioners' standing that the Court raised but did not resolve in its opinion in that case. *Yniguez*, 117 S. Ct. at 1067-75. As to mootness, unlike Maria-Kelley F. Yniguez, the plaintiffs below were and remain four elected officials, five state employees, and one public school teacher. Pet. App. 11a. As a result,

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[11] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 362 (1989) (granting certiorari before judgment in the Eighth Circuit in order to consider constitutional issues).

they continue to be subject to the provisions of Article XXVIII.

Similarly, this case does not raise the same concerns about petitioners' standing that *Yniguez* did. With respect to the Official English provision, the people of Arizona vested in themselves not only a share of the legislative power through the initiative process, Ariz. Const. art. IV, pt. 1, but also a share of the executive power of enforcement. Section 4 of Article XXVIII, entitled "Enforcement; Standing," provides that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State." *Id.; see Yniguez*, 117 S. Ct. at 1068 ("Article XXVIII's citizen suit provision . . . authorizes suits to enforce Article XXVIII in state court"). Arizona courts have recognized that where a statute provides for citizen enforcement, "[c]itizens of the state may act for the benefit of the state as a whole" under the "private attorney general" doctrine. *Kadish v. Arizona State Land Dep't*, 747 P.2d 1183, 1197 (Ariz. 1987), *aff'd, ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *see Arnold v. Arizona Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989) (applying doctrine).

The Ninth Circuit recognized that compelling logic behind vesting such enforcement authority in private attorneys general as well as in constituted officers of government. "[A]s appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative." *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991). The same concern about public officials' indifference that drives the initiative process also drives the concern for alternative means of enforcement: "While the people may not always be able to count on their elected

representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so." *Id.*

Thus, petitioners have standing to enforce the Official English amendment in Arizona state courts, out of which this petition arises. The decision of the Arizona Supreme Court below, which struck down the Official English amendment in its entirety under the federal constitution, nullified the state constitutional right of petitioners to seek enforcement of the Official English amendment in the state courts. This case is wholly unlike *Yniguez*, where petitioners challenged the federal district court and Ninth Circuit rulings that invalidated Article XXVIII. This Court expressed concern about petitioners' standing in that case because, "[a]s nonparties in the District Court, AOE's members were not bound by the judgment for Yniguez," and the federal district court "judgment had slim precedential effect, . . . [leaving] AOE entirely free to invoke Article XXVIII, § 4, the citizen suit provision, in state court, where AOE could pursue whatever relief state law authorized." 117 S. Ct. at 1068; *see also id.* at 1064 n.11 (concerning whether the lower federal courts' decisions were "binding precedent on Arizona's judiciary"). By contrast, petitioners were parties to all stages of the proceedings below, and the Arizona Supreme Court's application of federal constitutional principles is fully binding on any further attempts at enforcement in state court. Indeed, any attempt by petitioners to enforce Article XXVIII in state court would expose them to liability for sanctions in light of the Arizona Supreme Court's decision. *See* Ariz. Rev. Stat. § 12-341.01(C); Ariz. R. Civ. P. 11(a).

This Court has recognized in similar circumstances that parties in petitioners' position have standing to seek review

by this Court of an adverse state court ruling based on federal law. *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). The Court noted that even if the parties in *ASARCO* would not have had standing under federal requirements to bring the action in the federal courts in the first instance, "[a]t this juncture, petitioners allege a specific injury stemming from the state-court decree, a decree which rests on principles of federal law." *Id.* at 617. The Court agreed with the petitioners in *ASARCO* that, "as a result of the state-court judgment, the case has taken on such definite shape that they are under a defined and specific legal obligation, one which causes them direct injury." *Id.* at 618. Here, as in *ASARCO*, "[t]he state proceedings ended in a declaratory judgment adverse to petitioners, an adjudication of legal rights which constitutes a kind of injury cognizable in this Court on review from the state courts." *Id.*

As the result of the Arizona Supreme Court's ruling, petitioners "are faced with 'actual or threatened injury' that is sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." *Id.* The Ninth Circuit recognized in the *Yniguez* case that AOE and its members are more than mere "'concerned bystanders,' who will use [the appeal] simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)); *see Yniguez*, 939 F.2d

at 732.[12] AOE and Robert Park were the principal sponsors of the ballot initiative on Article XXVIII, and they have intervened or sought to intervene in all but one of the ten proceedings that have ever been held on Article XXVIII. Indeed, the Ninth Circuit noted that AOE and Park did not intervene in the sole exception – the district court proceeding in *Yniguez* – "only because they had been expressly assured by the Attorney General that he would vigorously represent their interests." *Yniguez*, 939 F.2d at 734.

Thus, the Ninth Circuit recognized, as matter of fact, that petitioners here not only had a right to enforce Article XXVIII, but also had expressed "their intention to see Article XXVIII enforced against Yniguez." *Id.* As a consequence, there was a "more than speculative threat that Park was about to bring an action to enforce Article XXVIII" when the federal declaratory judgment action was filed nearly a decade ago. *Id.* at 734. This Court has found standing in similar circumstances where the peti-

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[12] Article XXVIII's express grant of standing to petitioners to enforce the constitutional provision in state court makes their standing distinct from that of the physician in *Diamond* whose "personal and professional interests" disposed him in favor of the abortion restrictions at issue. 476 U.S. at 66. The Court noted that the "Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met." *Id.* at 65 n.17; *see also id.* at 77 (O'Connor, J., concurring) ("Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him *to sue or be sued* by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation.") (emphasis added). Here, petitioners do have the right to sue to enforce Article XXVIII, a right nullified by the state court decision below.

tioners' interest was based on a likelihood of their future actions rather than a "certainty," because the probability of their future conduct gave them "a sufficient stake in the outcome of the controversy to afford them standing to appeal." *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980). Thus, petitioners here have shown "a 'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed.'" *Clinton v. City of New York*, 118 S. Ct. 2091, 2099 (1998) (quoting *Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997)). Unless this Court grants certiorari to review the decision below, it is difficult to discern how any party will ever be able to obtain review of the state court's invalidation of Article XXVIII on the basis of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Supreme Court of Arizona and review the decision of that court.

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Date: August 27, 1998